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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

BURLINGTON NORTHERN RAILROAD COMPANY;
R. H. SHALHOOP
Petitioners,

v.

JOAN FAYE WHITT, Administratrix of the Estate
of William Charles Whitt, Deceased
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

I. THIS CASE RAISES IMPORTANT DUE PROCESS QUESTIONS NOT RESOLVED BY *HASLIP*

This case raises important questions of federal law not resolved—or even addressed—by this Court's recent decision in *Pacific Mut. Life Ins. Co. v. Haslip*, No. 89-1279, slip op. (Mar. 4, 1991). There, relying heavily upon the historical roots of punitive damages in the common law, this Court held that punitive damages awarded subject to reasonable instructions and post-verdict review would not violate due process.

This case, by contrast, presents the question whether an admitted departure from historical practice—punitive damages awarded for simple negligence—violates the substantive guarantees of the Due Process Clause. It also presents the question whether a statutory scheme that precludes *any* consideration of actual loss is consistent with due process.

By prohibiting any analysis of actual loss at the same time that it eliminates a *mens rea* requirement, the Alabama wrongful death scheme leaves the jury and reviewing courts without a meaningful basis on which to determine an award—a quandary admitted here by the trial court. This case would therefore serve as a useful complement to *Haslip*. It would permit this Court to identify the ingredients that the record must contain for meaningful review and delineate the outer boundaries of that opinion.

A. This Case Presents the Question Whether An Award of Punitive Damages for Simple Negligence Violates Due Process

Consistent with the Alabama statute, the trial court repeatedly instructed the jury that it could award punitive damages based on simple negligence. Respondent seeks to avoid the import of these instructions by referring to the reviewing court's statement that there was "substantial evidence of wantonness" in the record. App. at 18a. As the remainder of the very same sentence demonstrates, however, the court did not make a determination that the case actually involved wantonness, but rather held that "the issue was properly submitted to the jury." *Id.* Nor was a resolution of this issue essential to the plaintiff's verdict. Under Alabama law, a finding of wantonness was necessary only if the jury concluded that there was contributory negligence. The Supreme Court of Alabama held that *both* of these issues (contributory negligence and wantonness) were disputed and properly submitted to the jury. App. at 17a-19a. Thus, the appellate opinion is consistent with the instructions given to the jury, that in the absence of contributory negligence, a finding of simple negligence would support liability and an award of punitive damages.[1]

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[1] Respondent attempts to transform what was obviously an accident to an intentional tort by asserting a post-accident "coverup." But here as elsewhere respondent overstates the record. For example, respondent relies on testimony from one of the deceased's friends that following the accident a "black man" entered the signal

Imposing punitive damages for simple negligence raises profound constitutional questions, to which history does not provide affirmative answers. In over two centuries of Anglo-American jurisprudence, negligence has never been sufficient to support a punitive damage award. Pet. at 18-22. Nor do the decisions of this Court provide comfort. This Court has repeatedly found *mens rea* inextricably linked to punishment. Pet. at 25-30.[2] Respondent provides no substantive rebuttal to petitioners' contention that allowing *unlimited* punitive damages for simple negligence exceeds constitutional limitations on the state's power to punish.

Respondent does not challenge the importance of this question. Respondent does not deny, for instance, that this case holds significance not only for Alabama, but also for jurisdictions that permit punitive damages to be imposed for gross negligence. Pet. at 19. Nor does respondent dispute the significance of this issue to products lia-

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house and turned on the lights. Brief in Opposition ("Opp. Cert.") at 3, 5, 8. "He was a colored man is all I can tell you." Tr. 1407. In fact, the only black crewman testified that, after jumping from the burning train, dizzy with head lacerations and bleeding, he was led down the tracks to get medical attention. Tr. 1673-74, 1683-84. The employee unequivocally denied that he had entered the signal house and turned on any lights. The only contradiction respondent even suggests in the employee's testimony concerns how far down the tracks he was able to progress—a matter plainly irrelevant to the issue of wantonness.

[2] In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), the central issue was one of vicarious liability—whether an employee's undisputed liability for punitive damages could be shifted to his employer. Pet. at 23-25. The Court did not analyze whether imposing punitive damages for the employee's negligence was constitutional. The ruling in *Haslip* confirms this reading of the case. There, the Court cited *Pizitz* in support of its holding that imposing punitive damages on corporations for the *intentional* torts of their employees did not offend due process. Slip op. at 11.

The petition in *Clardy v. Sanders*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376 (1989), did not raise the questions presented here; no significance can be attached to this Court's pre-*Haslip* denial of certiorari.

bility actions, where punitive damage awards are increasingly combined with findings of liability based on strict liability. Pet. at 19-20. In view of the ever-widening range of conduct for which punitive damages are now awarded, this Court should define an appropriate constitutional boundary.

B. A State Law That Precludes Consideration of Plaintiff's Losses in Assessing Punitive Damages Does Not Permit the Analysis Required By *Haslip*

Haslip confirms that the Due Process Clause of the Fourteenth Amendment places some limits on a state's ability to award punitive damages. Slip op. at 15. This case presents an issue that tests these limits—whether a state law that precludes consideration of the amount of the plaintiff's actual loss in setting punitive damages satisfies due process.

This Court in *Haslip* recognized the important role compensatory damages serve in measuring the constitutional adequacy of punitive damage awards. A properly conducted judicial review, for example, ensures that jury verdicts "have some understandable relationship to compensatory damages." Slip op. at 18-19. Moreover, in concluding that the *Haslip* verdict did not "cross the line into the area of constitutional impropriety," this Court compared the award with both the compensatory damages and the out-of-pocket loss. Slip op. at 20. Justice Kennedy similarly recognized that "the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice." Slip op. at 3 (Kennedy, J., concurring).

No such comparison was possible in this case. The jury heard no evidence on plaintiff's actual loss and received no instruction on compensatory damages. The reviewing courts did not (and could not) consider this factor and did not refer to any of the other factors set forth in *Hammond v. City of Gadsen*, 493 So. 2d 1374 (Ala. 1986), and *Green Oil v. Hornsby*, 539 So. 2d 218 (Ala.

1989). Thus, this case raises the question of what kind of record is necessary to ensure meaningful scrutiny of a punitive damage award.

Petitioners' initial brief described how the states place differing reliance upon compensatory damages in assessing punitive damage awards. Pet. at 14-18. Respondent answers that petitioners "fail[] to recognize the very healthy number of courts" that do not currently require consideration of compensatory damages. Opp. Cert. at 19. To the contrary, that is precisely why this petition presents a certworthy issue. Although Alabama may be extreme in precluding *any* consideration of plaintiff's loss in assessing punitive damages, this case provides an opportunity to guide those states that do not require some consideration of this factor.

Respondent focuses upon states that permit nominal damages to support a punitive damages award. Opp. Cert. at 19. Even in those states, however, juries have the benefit of the evidence on plaintiff's loss as well as the guidance from the instructions on compensatory damages. They are provided a relatively comprehensible benchmark to inform their discretion in awarding punitive damages. In contrast, juries in Alabama wrongful-death cases do not have this measure of the enormity of the wrong to assist in their deliberations.

Respondent also argues that Alabama's wrongful death statute is "nonpenal on its face and in its effect." Opp. Cert. at 21 (footnotes omitted). If respondent is correct that the statute is essentially compensatory, this argument only highlights the due process violation inherent in the Alabama statute. As Justice Scalia stated in *Haslip*, "it would surely not be considered 'fair' (or in accordance with due process)" to dispense with "meaningful guidance concerning *compensatory* damages, so long as whatever number the jury picks out of the air can be reduced by the trial judge or on appeal." Slip op. at 14 (Scalia, J., concurring). Under this statute, however,

Alabama juries hear no evidence regarding loss and are given no "meaningful guidance" regarding compensatory damages. There is no support in history for this approach, nor does it provide a rational means to further the stated objective.

Respondent argues that the Supreme Court of Alabama's "*de novo*" review legitimates the $5 million award in this case. Respondent misreads the opinion. There was no *de novo* determination. The Supreme Court of Alabama accorded the jury verdict a "strong presumption of correctness," which was "strengthened by the trial court's denial of a motion for a new trial." App. at 17a. In any event, due process does not permit a reviewing court to substitute its guess for the jury verdict, particularly where the appellate record on plaintiff's actual losses is as empty as the record before the jury.

Respondent acknowledges that the Supreme Court of Alabama routinely quotes verbatim from the trial court's order to satisfy what respondent deems a "*de novo* reassessment" of punitive damage awards. Opp. Cert. at 24 (citing cases). Not only is this a peculiar view of a *de novo* analysis, but the verbatim quotation here merely illuminated the trial court's frustration with the absence of reference points.

The appellate court could not do any better with the record. It was unable to find a flaw in the trial court's *Hammond* review, even though it concluded that the verdict was wide of the mark by $10 million. Ultimately, the damages were not determined by an understandable process in which the parties could participate, but by a comparison with unnamed, unquantified verdicts in potentially dissimilar cases. This is not due process.

In *Haslip*, the Court observed: "One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Slip Op. at 15. In this case, the jury and courts were not even permitted to consider a crucial factor that

might have avoided an unconscionable result. This Court should grant review in order to clarify the role of actual loss in determining punitive damages.

II. PETITIONERS ADEQUATELY PRESENTED AND PRESERVED THEIR CONSTITUTIONAL CLAIMS

The constitutional questions raised in this petition were adequately presented below. Petitioners initially raised their constitutional claims by objecting to the jury charge on punitive damages. Under Alabama law, a challenge to the constitutionality of punitive damages "during the instructions to the jury" is adequate to preserve the issue for appeal.[3] Following trial, petitioners pressed their due process claims at every stage of the state proceedings. Pet. at 6-9, App. at 48a-63a.

Respondent nonetheless argues that petitioners failed to do enough at trial to preserve their claims. Citing *Alabama Elec. Coop. v. Tapley*, 546 So. 2d 371, 375 (Ala. 1989), respondent contends that petitioners had a responsibility to offer "constitutionally correct" jury instructions. Opp. Cert. at 11-12. Respondent not only misreads *Tapley*, but ignores the plain language of Ala. R. Civ. P. 51.

In *Tapley*, the Supreme Court of Alabama refused to consider several procedural due process challenges to the imposition of punitive damages, citing the appellant's failure *either* to object to the trial court's jury charges, *or* to request alternative instructions. *Tapley*, 546 So. 2d at 375-76. On its face, the opinion makes clear that appellant had *two* available avenues to preserve its issues for appeal. *Tapley* did not hold that parties must provide alternative instructions to preserve appellate review of objectionable charges. Indeed, such a requirement would contradict Ala. R. Civ. P. 51, which explicitly states that "[s]ubmission of additional explanatory charges shall not

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[3] *See Alabama Power Co. v. Capps*, 519 So. 2d 1328, 1330 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988); *Alabama Power Co. v. Courtney*, 539 So. 2d 170, 173 (Ala. 1988).

be required unless requested by the court." [4] Here, the trial judge did not request petitioners to submit additional charges following their objection. Under Rule 51, therefore, petitioners did all that was required to preserve their claims for appeal.[5]

Respondent also asserts that petitioners failed to present their constitutional claims with sufficient specificity. Opp. Cert. at 9. But petitioners advised the trial court that they were objecting to the *punitive damages* instruction, that the objection was based on the *federal* Constitution and, specifically, the *Due Process Clause of the Fourteenth Amendment*. App. at 47a-48a. In response to petitioners' objection, the trial judge stated "Okay. Noted," App. at 48a, thus leaving no doubt that the substance of the objection was understood. As a matter of Alabama law, petitioners' objection was sufficiently specific to preserve the issue for appellate review.

To preserve an objection to a jury instruction, Ala. R. Civ. P. 51 requires parties to "state the matter to which he objects, and the grounds for his objection." Unlike its federal counterpart, however, Alabama's Rule 51 does not require that grounds for objections be "distinctly" stated. As the Committee Comments to Rule 51 explain, this requirement was deliberately deleted from the Alabama rule "to avert undue requirements of specificity under an unnecessarily technical appellate construction of the word 'distinctly'." [6] True to the spirit of this language, the Supreme Court of Alabama consistently has refused

[4] *Accord Robinson v. Harris*, 370 So. 2d 961, 966 (Ala. 1979). The Committee Comments to Rule 51 further explain that "[i]f the court upon hearing an objection to the charge declines to supplement or modify its charge, the matter is preserved for appellate purposes."

[5] Respondent also cites Fed. R. Crim. P. 30 and a decision interpreting it, but it is hard to see how a *federal* rule of *criminal* procedure has any bearing at all.

[6] In light of this unambiguous departure from federal procedure, respondent's reliance on Fed. R. Civ. P. 51 and decisions under that rule is misplaced. Opp. Cert. at 10 n.21.

to "permit an overly rigid enforcement of the rule."[7] It is thus not surprising that respondent is unable to cite a single Alabama decision to support the contention that petitioners' objection was not sufficiently detailed.

In any event, that contention simply evaporates in view of the unreasonable restrictions placed upon petitioners' counsel in stating his objections. On three occasions, he asked for an opportunity to make a fuller exposition of the objection out of the hearing of the jury, as was his right under Ala. R. Civ. P. 51. App. at 48a. Despite counsel's complaint that he could not candidly voice his objections less than ten feet from the jury, the court denied his request. The scope and duration of counsel's objections were thus understandably limited. In circumstances very similar to these, the Supreme Court of Alabama has refused to "so technically construe[] [Rule 51] as to obliterate its spirit." *Grayco Resources, Inc.*, 500 So. 2d at 1032 (excusing failure to specify grounds for objections where made during "whispered bench conference").[8]

The objection made during trial, the amplification on that objection in post-trial motions, and the briefing before the Supreme Court of Alabama plainly raised petitioners' constitutional attack on the structure of the Alabama wrongful death statute. Thus "the record as a

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[7] *Hosey v. Seibels Bruce Group*, 363 So. 2d 751 (Ala. 1978). *See also Alewine v. Southern Ky. Co.*, 531 So. 2d 315, 317 (Ala. 1988); *Grayco Resources, Inc. v. Poole*, 500 So. 2d 1030, 1032 (Ala. 1986); *Snow v. Baldwin*, 491 So. 2d 900, 903 (Ala. 1986); *Odom v. Linsey*, 365 So. 2d 664, 666 (Ala. 1978); *Gardner v. Dorsey*, 331 So. 2d 634, 636 (Ala. 1976).

Indeed, the Supreme Court of Alabama has entertained similar substantive due process challenges to the Alabama wrongful death statute even when no objection has been made during the instructions. *See Tapley*, 546 So. 2d at 376.

[8] The trial court's failure to provide petitioners' counsel an opportunity to object out of the presence of the jury unreasonably burdened petitioners' assertion of their federal rights. *Cf. Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965); *Staub v. City of Baxley*, 355 U.S. 313, 319-20 (1958); *Davis v. Wechsler*, 263 U.S. 22 (1923).

whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493, 496-97 (1981).[9] As a result, the Supreme Court of Alabama's failure to restate its long held position on the Alabama statute is as reviewable as an express decision. *See Street v. New York*, 394 U.S. 576 (1969).[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] Whether a constitutional issue has been adequately raised for purposes of Supreme Court review is ultimately a federal question. *See Street v. New York*, 394 U.S. 576, 584 (1969).

[10] Even if the Supreme Court of Alabama silently relied on some sort of procedural ground in denying relief, such a novel ruling would not represent an adequate state ground. This Court has indicated that a state rule is not a bar to federal jurisdiction where it is not "strictly or regularly followed." *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964); *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 263 (1982).